UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

SALVATORE CIRAMI, et al.,
Defendants.

73 C 274

MEMORANDUM & ORDER

December 8, 1981

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PLATT, D.J.

This is an extraordinary case, not by reason of anything the defendants have shown but because of their adroitness in avoiding payment of tax deficiencies of $153,087.34 plus a penalty of $19,570.91 assessed against them for the years 1961-63.[1] To appreciate the skill of defendants in this respect, one must first read the Court of Appeals opinions[2] reported at 535 F.2d 736 (1976) and 563 F.2d 26 (1977) (familiarity with which is assumed here) and the record established before this Court in the evidentiary hearing on remand.

Following such hearing, this Court finds that the defendants have failed to show, under Rule 60(b)(6), "exceptional circumstances" or "extreme hardship."[3] With respect to the "excep-

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[1] While the government has been accruing interest on this amount, the inflation rate for the past 20 years has reduced the same from a substantial to a relatively small amount.

[2] The history of this action is set forth in detail in these opinions and will not be repeated here.

[3] There was no evidence whatever which even tended to show that the defendants were not in a position to pay the taxes. Indeed, if anything, the evidence tended to show just the opposite. (C-II.24-27).

The transcript references are based on the following:

C-I —Mr. Cirami's testimony on May 22, 1981
C-II —Mr. Cirami's testimony on May 29, 1981
N —Mr. Newman's testimony on June 19, 1981
M-I —Mr. Morrow's testimony on July 10, 1981
M-II—Mr. Morrow's testimony on July 13, 1981
A —separately bound joint appendix submitted to the Court of Appeals.

tional circumstances" test, in the first of its two opinions on the defendants' present motion the Court of Appeals told the defendants what one must do to sustain a motion of this sort in the following words (535 F.2d at 741):

> The case before us is clearly distinguishable. There is not the unusual circumstance of attorney disappearance, and there is no allegation of any effort to contact the former attorney to ascertain the status of the litigation at any point or even to provide the court below with any explanation for his failure to oppose the motion for summary judgment. *L.P. Steuart, Inc. v. Matthews, supra*, is equally inapposite. In that case former counsel's affidavit revealed that at the time of his default he had been beset by personal problems, including the death of his parents and the serious illness of his wife. Moreover, his client's affidavit noted that he had made numerous inquiries of his former counsel who had either refused to answer or had assured him that the case was proceeding and would soon be settled. Judge Edgerton found that Rule 60(b)(6) was broad enough to permit relief when "personal problems of counsel cause him grossly to neglect a diligent client's case and mislead the client." 329 F.2d at 235.[3] (footnote omitted).

The defendants appear to have attempted to comply with the factors set forth in the Court of Appeals' discussion by pointing up "personal problems" of "former counsel" in the second of their two motions.

The difficulty here, however, with defendants' new motion is that whatever problems Peter R. Newman, Esq., may or may not have had in the winter and spring of 1974 they were not the cause of the "no opposition" to the government's original partial summary judgment motion.

The record is clear that Mr. Newman was retained by the defendants in or about March 1973 "within a day or two days" of the time an answer to the government's complaint was due to be filed in this case. (N. 23). Assuming, *arguendo*, that the

defendants did not appreciate the fact that they needed to assemble and exhibit to the Internal Revenue Service records to substantiate the business expenses and deductions which they had claimed on their tax returns from a date of the assessment in or about 1966 to the date of Mr. Newman's retention—i.e., for seven years or more (and that is a big assumption in defendants' favor), they knew in March of 1973 that such documentation was needed because Mr. Newman told them so (N. 23-24, 30). Mr. Cirami told Mr. Newman to see his accountant, De Stefano, who he said knew where these documents were (N. 24-25, C-1, 90-91). Mr. Newman did so several times and finally Mr. De Stefano advised him that they were all lost (N. 27, 47-48).

Mr. Newman reported to Mr. Cirami that Mr. De Stefano had informed him that all the records were lost and Mr. Cirami then expressed to Mr. Newman that he had a very low opinion of Mr. De Stefano for losing the records (N. 30). The Court credits the foregoing testimony of Mr. Newman and his statements that despite repeated efforts and requests by him of Mr. De Stefano and Mr. Cirami, not one substantiating record was ever made available to him (N. 24, 27, 30). Mr. Newman's testimony in this respect was fully corroborated by government counsel William Morrow who testified (M-II.10-11) that Mr. De Stefano told him he could not find any cancelled checks, invoices or receipts.

During the ensuing nine-month period from March to December 1973 when the government made its motion for summary judgment, Mr. Newman scarcely acted like one who was not tending to his clients' business. Not only did he make repeated requests of Messrs. Cirami and De Stefano for the pertinent records but he made trips to Puerto Rico and Washington, argued and filed an affidavit in September in opposition to the government's motion to dismiss defendants' counterclaim and filed a brief in support thereof.

On December 28, 1973 the government made its motion for partial summary judgment with a return date of February 6, 1974. On the latter date[4] Mr. Newman appeared in Judge

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[4] Mr. Newman also attended a status conference on January 3, 1974.

Bruchhausen's chambers and explained to the Judge's law clerk that the defendants had not been able to supply him with any books or records or any cancelled checks or receipts to substantiate their claimed deductions. He asked for more time to find such records and the law clerk after conferring with Judge Bruchhausen gave him two additional weeks, i.e., to February 15th and the government was given until March 15th to reply.

Between February 6th and March 1 Mr. Morrow conferred with Mr. Newman who said that he had not been able to obtain any records from the defendants.

The reason then for the lack of opposition to the government's motion was, not as defendant now claims, due to Mr. Newman's condition, but because of the defendants' failure to give him any records—not even one single document with which to oppose the motion.

Under the circumstances Judge Bruchhausen properly entered an order granting the government's motion, not on default, but on the ground that there was "no opposition" thereto.

The fantasy that Mr. Newman was unaware of what was happening in this case and that he had "constructively disappeared" is completely destroyed by the events which followed. Shortly after the entry of partial summary judgment in favor of the government on March 18-19, 1974, there was a status conference held in this Court before Judge Bruchhausen on April 10, 1974. (A-2). Mr. Newman attended this status conference (M-I.19) and was aware that the government's motion for partial summary judgment had been granted (M-I.19-21). The status conference was held to set a discovery and trial schedule on the fraudulent conveyance issue which was the only issue left in the lawsuit (M-I.19-21). Most significantly at that status conference Mr. Newman claimed he was "bound in" by the fact that Mr. Cirami had been convicted in a criminal trial for evasion of certain other taxes. Mr. Newman said that because of an appeal of that conviction, Mr. Cirami could not appear in this civil case for depositions or trial (Government Ex. 3). Therefore, at Mr. Newman's request, the status conference was adjourned until June 24, 1974 (Government Ex. 3, A-2). Again

at the adjourned date for such status conference, to wit, on June 24th, Mr. Newman appeared and made a further request for a continuance because of Mr. Cirami's appeal from his criminal conviction (M-I.21-22).

Moreover, as must be clear from the facts found above, the defendants failed to show on the remand hearing that Mr. Newman was suffering from a mental disorder sufficient to affect his performance in this case. It may well be that Mr. Newman failed to advise his client of the entry of the order for partial summary judgment. However, it appears quite clear that (i) he felt the matter was hopeless and (ii) he thought he should "buy time" for further discovery on the fraudulent conveyance issue on the strength of Mr. Cirami's conviction and appeal—a very sensible and logical thing to do under the circumstances.

Furthermore, Mr. Newman was not "seeing a psychiatrist during this period" (563 F.2d at 31). He had voluntarily discontinued seeing a psychologist in September 1971—three years before the events recorded here. Moreover, the Bar Association records tend to show not that he had a mental disorder but that he negligently failed to do certain things. This, needless to say, did not constitute proof of negligence in this case.

The long and the short of this whole proceeding is that the defendants failed to show that any misconduct or "mental disorder" on the part of Mr. Newman was the cause of there being no opposition to the government's motion for partial summary judgment herein and accordingly, the defendants owe the government the sum of $153,087.34 plus $19,578.91 in penalties, plus a large amount in interest and should be required to pay the same forthwith. If the government wishes to pursue the fraudulent conveyance issue, it should communicate with Deputy Clerk Bruce Nims (212/330-7928) and arrange for a scheduling of a trial.

SO ORDERED.

/s/ Thomas C. Platt

U.S.D.J.

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of May, one thousand nine hundred and eighty-two.

Present:

HONORABLE J. EDWARD LUMBARD,

HONORABLE IRVING R. KAUFMAN,

HONORABLE LAWRENCE W. PIERCE,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SALVATORE CIRAMI,

Defendant-Appellant.

82-6007

MARGARET CIRAMI, JAMES CIRAMI, MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION, NANCY CIRAMI, DIGGS MANAGEMENT CORP., JACOB ZELIGFELD, PRUDENTIAL INSURANCE COMPANY OF AMERICA, ANGELA CIRAMI and ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

1. In 1973, the Government filed a complaint against appellant Cirami and others seeking a judgment for over $200,000 in unpaid tax assessments and to set aside certain fraudulent conveyances. This tax deficiency resulted from the disallowance of deductions in 1961, 1962, and 1963, which Cirami claimed in the operation of his business, Air Freight Haulage Co., for lack of substantiation.

2. In December, 1973, the Government filed a motion for summary judgment solely on the claim involving the tax assessments. Peter Newman, who had been representing Cirami in this matter, did not oppose the motion. Judge Bruchhausen granted the Government's motion, and final judgment was entered in June, 1974. In May, 1975, a motion was filed pursuant to Federal Rules of Civil Procedure, Rule 60(b)(6), to vacate the June judgment. The motion was denied by the district court, and we affirmed. *See United States* v. *Cirami*, 535 F.2d 736 (2d Cir. 1976).

3. Several months later, a second Rule 60(b)(6) motion was filed alleging that the reason for the lack of any opposition to the Government's 1973 motion was the newly-discovered fact of Newman's mental illness. The district court denied the motion, but we reversed and remanded the case for an evidentiary hearing to determine whether attorney Newman had a mental illness and whether that illness resulted in the absence of a responsive pleading to the motion for partial summary judgment. *See United States* v. *Cirami*, 563 F.2d 26 (2d Cir. 1977).

4. On remand, after six days of hearings, Judge Platt found that Cirami failed to show that Newman was suffering from a mental disorder sufficient to affect his performance.

Futhermore, he found the reason for the lack of a response to the Government's motion was Cirami's failure to provide the business records necessary to oppose the motion. Accordingly, determining that the "exceptional circumstances" necessary for relief were not present, *see Rinieri* v. *News Syndicate Co.*, 385 F.2d 818, 822 (2d Cir. 1967), he denied the motion.

5. Appellant Cirami challenges Judge Platt's findings of fact. We will not set aside the findings of fact of the district court unless they are clearly erroneous. Federal Rules of Civil Procedure, Rule 52(a); *see Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291 (1960). Evidence presented at the hearing, although conflicting in some respects, demonstrated, *inter alia*, that Peter Newman, during the nine-month period from March to December, 1973, when the Government moved for summary judgment, made repeated requests of Cirami and his accountant DeStefano for the relevant records, made trips on Cirami's behalf to Washington and Puerto Rico, answered the February, 1973 Government complaint, argued and filed an affidavit in opposition to the Government's motion to dismiss defendants' counterclaim and filed a brief in support.

6. After the Government filed its motion for partial summary judgment, Mr. Newman appeared at several status conferences and explained he had not received records to substantiate the challenged deductions. Furthermore, he conferred with Government counsel William Morrow regarding his inability to obtain any records. Moreover, after the entry of judgment in favor of the Government, he continued to attend status conferences to discuss the summary judgment motion and the fraudulent conveyance issue.

7. Mr. Newman, furthermore, was not under psychiatric care during this period, and the Bar Association records of proceedings against him do not tend to show a mental disorder but rather that he was negligent in handling some clients' cases.

8. Based on this evidence, Judge Platt could properly find that Mr. Newman was not suffering from mental illness, and that a mental disorder was not the cause of the absence of a responsive pleading to the Government's motion for partial summary judgment. We do not find the district court's findings to be clearly erroneous. Accordingly, we are of the view that Judge Platt correctly denied the motion for relief pursuant to Rule 60(b)(6).

9. Appellant's other claims are equally without merit.

/s/
J. EDWARD LUMBARD,

/s/
IRVING R. KAUFMAN,

/s/
LAWRENCE W. PIERCE,
Circuit Judges.

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of June, one thousand nine hundred and eighty-two.

Present:

HON. J. EDWARD LUMBARD,

HON. IRVING R. KAUFMAN,

HON. LAWRENCE W. PIERCE,

Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SALATORE CIRAMI, MARGARET CIRAMI, JAMES CIRAMI, and MASPETH FEDERAL SAVINGS & LOAN ASSOCIATION, 82-6007

Defendants,

SALVATORE CIRAMI,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellant, Salvatore Cirami,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. Daniel Fusaro
Clerk

By:
Francis X. Gindhart
Chief Deputy Clerk